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APR 23 2013

BEFORE THE MISSISSIPPI EMPLOYEE APPEALS BOARD

EMPLOYEE APPEALS BOARD

RICHARD ARENDER

APPELLANT

VS.

CASE NO: 13-008

MISSISSIPPI DEPARTMENT OF
TRANSPORTATION

RESPONDENT

ORDER OF HEARING OFFICER

THIS CAUSE having come on to be heard in at the offices of the Employee Appeals Board in Jackson, MS. on April 2, 2013. The Appellant, Richard Arender, ("Arender") was unrepresented and the Mississippi Department of Transportation ("MDOT" or "Agency") was represented by the Honorable Joe Goff. The Agency representative present was Mr. John Head, State Director, Human Resources, MDOT. Also present, in observation only, was the Appellant's Attorney, Christopher Neyland, who represents Arender in a case before the Mississippi Workers Compensation Commission. Arender appeals his termination of January 10, 2013. Following the hearing, the record was kept open for seven (7) days to allow Arender to obtain forms from his physician and place those in evidence.

FINDINGS OF FACT

Arender was initially employed by MDOT in 2003 and promoted approximately 3 to 4 years ago to Maintenance technician III. The physical demands of this job typically requires one to "perform(sic) work that requires him/her to exert up to 50 pounds occasionally, and/or up to 20 pounds of force frequently, and/or up to 10 pounds of force constantly to move objects." The physical requirements of the job as listed are "not exhaustive" but the job description does indicate that "reasonable accommodations are possible".

In 2009, Arender injured [REDACTED] on the job and was off work from April 1, 2009 until July 29, 2010. He returned to work on or about August 26, 2010, in a modified/light duty position. This allows a maximum lifting limit of 20 pounds with frequent lifting of 10 pounds. On September 27, 2012, Arender returned to his physician for a yearly check-up. He underwent an MRI which revealed a [REDACTED]. He was returned to light work on September 27, 2012, and ordered to undergo an FCE.

Arender received notice that he may be eligible to be placed on the Family Medical Leave Act ("FMLA") by letter dated October 23, 2012, and was given a copy of the FMLA forms to be completed by his physician.

An Administrative Review Hearing Notice was forwarded to Arender November 29, 2012, by certified mail notifying him of a hearing on December 19, 2012. The notice set forth the purpose of the hearing was to address the following issues:

1. To determine if Arender has a disability. The notice defined disability as a physical or mental impairment that substantially limits a major life activity...
2. If so, does the disability prohibit Arender from performing the job related requirements and essential functions of his position?
3. If the answer to #2 is yes, is there a reasonable accommodation which MDOT could make, without causing an undue hardship to MDOT operations, that would allow you to perform the job-related requirements and essential functions of your position?
4. If Arender does not meet the definition of being disabled, is he unable to perform the essential functions of the job or is he not able to meet the eligibility criteria for the position he holds?

The Administrative Determination Notice dated January 10, 2013, sent certified mail to Arender indicates that at the December 19, 2012 hearing "John Head, Hearing Officer, questioned you concerning your failure to submit the required FMLA forms. Mr. Head allowed you additional time to submit the forms." The Notice also states that "on January 8, 2013, Human Resources received the FMLA forms.[which] has not been properly completed and did not reflect that his absence qualifies as FMLA leave." The Agency determined that Arender did not qualify as having a disability under the ADA. Therefore, the Agency made the determination that Arender was unable to perform the essential functions of his job and was unable to meet the eligibility criteria for his position. It was also found that there was a legal non-conduct basis which meets the statutory requirement of "good cause" causing the separation of employment.

CONCLUSIONS OF LAW

The document that Arender submitted following the hearing was the result of a functional capacity exam and the job description used in that exam was that of a Maintenance Worker II based upon the Dictionary of Occupational Titles ("DOT"). Arender's job was Maintenance Worker III therefore, the job description used in the FCE is not the same and will not be considered. However, the Return to Work form dated August 17, 2010, as well as the impairment rating given Arender by his treating physician dated September 17, 2010, indicated that he was capable of light to medium duty work. Arender did return to work but it is unclear whether or not he was given any accommodations for his physical condition. He worked until September 2012, but it is also unclear how much time he missed in the fall of 2012, as a result of [REDACTED]. Nevertheless, Arender was required to submit the FMLA forms to MDOT and he did not do so. Although he had no control over the content of the forms, as that was

within the direction of his physician, he did not make a reasonable effort to get the forms to MDOT within the time allowed.

Arender has the burden of proving that the grounds for his termination are either untrue or an insufficient basis for the termination. He did not meet that burden. Arender offered no proof at the hearing that he met the criteria for the Maintenance III job. His testimony that "he had been doing the job until he returned for the annual physical with his physician" is insufficient to meet the burden in this case. The evidence reflects that Arender is capable of light duty work and his job as a Maintenance Technician III is, at a minimum, medium duty work. Therefore, based upon the record in this case, MDOT's termination of Arender is allowed and will not be overturned.

IT IS THEREFORE ORDERED THAT THE APPEAL OF RICHARD ARENDER IS HEREBY DISMISSED, WITH PREJUDICE.

THIS THE ^{3rd}~~2~~ DAY OF APRIL, 2012.


WESLA SULLIVAN LEECH
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